(3)

No. 94-1558

FILED
JUN 9 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FRANCIS W. PARKER SCHOOL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JOHN P. ROWE
General Counsel (Acting)
Equal Employment Opportunity Commission
Washington, D.C. 20507

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases:	Page
DiBiase v. *SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995)	2
EEOC v. *Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984)	3, 4
EEOC v. *Local 350, Plumbers & Pipefitters*, 998 F.2d 641 (9th Cir. 1992, amended 1993)	5
Gehring v. *Case*, 43 F.3d 340 (7th Cir. 1994), petition for cert. pending (No. 94-1780)	2
Geller v. *Markham*, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981)	3, 4
Hazen Paper Co. v. *Biggins*, 113 S. Ct. 1701 (1993)	4
Houghton v. *Sipco, Inc.*, 38 F.3d 953 (8th Cir. 1994)	5
Leftwich v. *Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983)	3, 4
St. Mary's Honor Center v. *Hicks*, 113 S. Ct. 2742 (1993)	9
Wards Cove Packing Co. v. *Atonio*, 490 U.S. 642 (1989)	8, 9
Statutes:	
29 U.S.C. 621(b)	7
29 U.S.C. 623(a)(2)	6
29 U.S.C. 623(f)(2) (1988 & Supp. V 1993)	7
Miscellaneous:	
118 Cong. Rec. 4943 (1972)	6

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1558

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

FRANCIS W. PARKER SCHOOL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In our petition, we have argued that the Court should grant certiorari to resolve the question whether the ADEA prohibits disparate impact discrimination. We have also argued that the Court should grant review of the related question whether the ADEA's prohibition of disparate impact discrimination protects applicants for employment. In its brief in opposition, respondent argues that review in this case is unwarranted for several reasons. None, however, is persuasive.

1. Respondent argues that the "fundamental flaw" in our petition is that while the court of appeals

"strongly hinted that disparate impact may not be a viable theory of liability under the ADEA, * * * it manifestly did not so hold." Br. in Opp. 5. The court below expressly held, however, that "decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited [by the ADEA]." Pet. App. 6a. Because the EEOC had failed to demonstrate that respondent's practice was "a subterfuge for the belief that older teachers are less effective than younger teachers," and demonstrated only that the challenged practice "disproportionately affects older applicants," the court affirmed the district court's decision granting summary judgment in favor of respondent. *Id.* at 9a. It is therefore clear that the court of appeals held that the ADEA does not prohibit disparate impact discrimination and ruled against the EEOC on that basis.

Not surprisingly, the Seventh Circuit has subsequently characterized the decision in this case as holding that disparate impact is "a theory of age discrimination that is unavailable in this circuit." *Gehring* v. *Case Corp.*, 43 F.3d 340, 342 (1994) petition for cert. pending (No. 94-1780). And in a case relied upon by respondent (Br. in Opp. 8), Judge Greenberg recently characterized the decision in the same way. See *DiBiase* v. *SmithKline Beecham Corp.*, 48 F.3d 719, 733 (3d Cir. 1995) (Greenberg, J.) (citing this case for the proposition that "[t]he Court of Appeals for the Seventh Circuit * * * recently held that disparate impact liability is unavailable under the ADEA").[1]

---

[1] Respondent asserts (Br. in Opp. 5 n.2) that "even Judge Cudahy in his dissent recognized that the majority opinion

2. As we have explained in our petition (Pet. 8-9), review is warranted in this case because the Seventh Circuit's holding that the ADEA does not prohibit disparate impact discrimination conflicts with decisions from the Second, Eighth, and Ninth Circuits. See *Geller* v. *Markham*, 635 F.2d 1027, 1032-1034 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981); *Leftwich* v. *Harris-Stowe State College*, 702 F.2d 686, 690-692 (8th Cir. 1983); *EEOC* v. *Borden's Inc.*, 724 F.2d 1390, 1394-1395 (9th Cir. 1984). Respondent contends (Br. in Opp. 6) that the Court should not grant review to resolve that conflict because *Geller*, *Leftwich*, and *Borden's* contain "virtually no legal analysis." The existence of a conflict in the circuits, however, does not depend on the quality or extent of a court's legal analysis. In any event, the issue in this case does not require an elaborate legal analysis. As we have argued in our petition (Pet. 9-10), the reason that the ADEA should be interpreted to reach disparate impact discrimination is that the substantive prohibitions in the ADEA are identical to the substantive prohibitions in Title VII, and this Court has authoritatively construed Title VII to reach disparate impact discrimination. *Geller* and *Borden's* expressly adopted that analysis and, by relying on

---

stopped 'slightly short' of extending as far as petitioner suggests." What Judge Cudahy actually said was that "the majority affirms the district court's grant of summary judgment on the apparent theory that [*Hazen Paper*] precludes the use of the disparate impact theory of liability under the ADEA." Pet. App. 10a. Judge Cudahy continued: "I say 'apparent theory' because the majority stops ever so slightly short of announcing this conclusion with perfect clarity. But that is the unmistakable import of the majority['s] approach." *Ibid.*

Geller, *Leftwich* implicitly adopted that analysis as well. *Geller*, 635 F.2d at 1032; *Borden's*, 724 F.2d at 1394; *Leftwich*, 702 F.2d at 690.[2]

Respondent alternatively suggests (Br. in Opp. 7-9) that the split in the circuits will abate because *Hazen Paper* contains a clear "direction from this Court that a disparate impact theory is not available under the Act." But the limited holding in *Hazen Paper* was that "there is no disparate *treatment* under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Hazen Paper Co.* v. *Biggins*, 113 S. Ct. 1701, 1705 (1993) (emphasis added). The Court emphasized in *Hazen Paper* that it was not deciding whether the ADEA prohibits disparate *impact* discrimination. *Id.* at 1706. Accordingly, *Hazen Paper* does not in any way undermine the decisions in *Geller*, *Leftwich*, and *Borden's*.

---

[2] Respondent offers two responses to our textual argument. First, it contends (Br. in Opp. 13-14) that the ADEA's exemption for reasonable factors other than age precludes a disparate impact claim. As explained in our petition, however, that interpretation of the exemption reads the term "reasonable" out of the exemption. The inclusion of that term shows that Congress contemplated that factors other than age that are unreasonable can be challenged on disparate impact grounds. And as the agencies responsible for enforcing the ADEA have long concluded, practices that lack a sufficient business justification are unreasonable. See Pet. 11-12. Respondent also contends (Br. in Opp. 15-17) that the legislative history of the ADEA supports the conclusion that the ADEA does not reach disparate impact discrimination. None of the legislative history cited by petitioner, however, is illuminating on that issue. Certainly, that history cannot override the statutory text upon which we rely.

Moreover, as we pointed out in our petition, the Eighth and the Ninth Circuits have adhered to their holdings that the ADEA prohibits disparate impact discrimination in post-*Hazen Paper* cases. *Houghton* v. *Sipco, Inc.*, 38 F.3d 953, 958-959 (8th Cir. 1994); *EEOC* v. *Local 350, Plumbers & Pipefitters*, 998 F.2d 641, 646, 648 n.2 (9th Cir. 1992, amended 1993). Respondent contends (Br. in Opp. 8) that the courts in *Houghton* and *Local 350* did not have any reason to analyze the issue. In *Houghton*, however, the court remanded for a new trial on plaintiff's disparate impact claim. 38 F.3d at 958-959. If the court had believed that *Hazen Paper* precluded such a claim, it would have entered judgment on that claim for the defendant. And in *Local 350*, the court expressly held that *Hazen Paper* did not foreclose the EEOC from pursuing a disparate impact claim on remand. 998 F.2d at 648 n.2.

3. As we have argued in our petition (Pet. 13-14), review is also warranted here because of the importance of the question presented. If proof of discriminatory motive were required to establish a violation under the ADEA, it would significantly narrow the scope of the protection afforded to older workers. Respondent asserts (Br. in Opp. 9) that the question is not important because disparate impact cases can "readily be converted to disparate treatment cases by proof of motive." That assertion is incorrect. In our petition we have set forth the kind of practices that the EEOC has challenged on a disparate impact theory. See Pet. 14. Those practices rarely are the product of a discriminatory motive.

This case is a good example. As we have described in our petition (Pet. 7), respondent's practice of re-

fusing to permit experienced teachers to compete for positions with salary caps when their experience level would require them to be paid at a higher salary under respondent's salary system has a disparate impact on older workers and lacks a sufficient business justification. But that practice was motivated by an intent to save money, not an intent to exclude older workers from employment. Accordingly, if the ADEA does not prohibit disparate impact discrimination, the practice at issue here and others like it (see Pet. 14) would not be subject to challenge, even when they have a seriously discriminatory effect on older workers' employment opportunities.

4. Respondent argues (Br. in Opp. 10-12) that this case is a poor vehicle for deciding whether the ADEA supports disparate impact liability because there are three other independent grounds supporting the court of appeals' judgment. That argument is unpersuasive.

a. Respondent first argues (Br. in Opp. 10) that the court of appeals' conclusion that 29 U.S.C. 623(a)(2) does not protect applicants for employment provides an alternative ground for affirmance. As we have shown in our petition, however, the plain language of Section 623(a)(2) reaches applicants for employment, and Congress did not intend the difference in language between Section 623(a)(2) and the analogous provision in Title VII to have any substantive significance. See Pet. 12-13; 29 U.S.C. 623(a)(2) (making it unlawful to engage in conduct that would deprive any "individual" of employment opportunities); 118 Cong. Rec. 4943 (1972) (noting that the inclusion of the term "applicants for employment" in the amendment to Title VII was intended to be "declaratory of present law"). Accordingly, we have sought review of the

court of appeals' conclusion that Section 623(a)(2) does not protect applicants for employment.

Respondent argues (Br. in Opp. 10) that this issue is not worthy of review by this Court. But the issue is both closely related to the principal question upon which we have sought review and of considerable independent importance. A paramount purpose of the ADEA is "to promote employment of older persons based on their ability." 29 U.S.C. 621(b). That goal would be seriously compromised if applicants for employment were not protected against disparate impact discrimination.

b. Respondent next contends (Br. in Opp. 10-11) that the practice challenged in this case is protected by 29 U.S.C. 623(f)(2) (1988 & Supp. V 1993), which provides that it is not unlawful "to observe the terms of a bona fide seniority system * * * which is not a subterfuge to evade the purposes of the chapter." As the district court concluded, however, the practice at issue here is not an aspect of respondent's collectively bargained-for seniority system. Pet. App. 27a. Under the express terms of the bargaining agreement, that seniority system governs only the progression of *incumbent* teacher salaries. It does not govern entry level salaries, which are left to the discretion of individual principals. *Ibid.*

Contrary to respondent's contention (Br. in Opp. 11), the court of appeals did not hold that the practice at issue here is protected by 29 U.S.C. 623(f)(2) (1988 & Supp. V 1993). Instead, it relied on Section 623(f)(2) for the limited purpose of supporting its conclusion that respondent's "policy of linking wages to experience is an economically defensible and reasonable means of determining salaries." Pet. App. 9a.

c. Respondent finally contends (Br. in Opp. 11-12) that the practice at issue here is supported by a sufficient business justification to defeat a disparate impact claim under the standard set forth in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989). Because the lower courts concluded that the ADEA does not prohibit disparate impact discrimination, however, they never reached the question of business justification. Indeed, because the courts granted summary judgment on the threshold question, the EEOC never had an opportunity to litigate the business justification issue. If the Court grants review and reverses on the ground that the ADEA prohibits unjustified disparate impact discrimination, the case would then be remanded for a determination whether there is an adequate business justification for the practice challenged in this case. That issue is not presently ripe for review.

We nonetheless note that respondent is mistaken in its view that the practice at issue here is lawful under *Wards Cove*. Respondent asserts (Br. in Opp. 12) that the practice significantly serves its interest in saving money. Even if that were so, the EEOC can still prevail under a disparate impact theory by showing that another practice without a disparate impact on older workers would serve that interest equally well. *Wards Cove*, 490 U.S. at 660-661. The EEOC can readily make that showing. As we have explained in our petition (Pet. 7), respondent's interest in saving money can be fully satisfied by setting a salary cap on a position and then permitting persons of all experience levels to compete for the

position at a salary no greater than that dictated by the cap.[3]

* * * * *

For the foregoing reasons as well as those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN P. ROWE
General Counsel (Acting)
Equal Employment
Opportunity Commission

JUNE 1995

---

[3] Respondent contends (Br. in Opp. 12) that the court of appeals' finding that the EEOC failed to prove that respondent's salary system was a pretext for intentional discrimination precludes the EEOC from prevailing on its disparate impact claim. That contention fails to take into account the difference between disparate treatment and disparate impact cases. To demonstrate pretext in a disparate treatment case, a plaintiff must show that an employer's articulated interest is a pretext for intentional discrimination. *St. Mary's Honor Center* v. *Hicks*, 113 S. Ct. 2742, 2747-2748 (1993). To counter a showing of business justification in a disparate impact case, a plaintiff must show that the employer's articulated justification can be served by another practice that does not have a disparate impact. *Wards Cove*, 490 U.S. at 660-661. The court of appeals' finding that the EEOC failed to show that the practice challenged in this case was a pretext for intentional discrimination has no bearing on the question whether the EEOC can establish that respondent's stated interest in saving money can be served by another practice that does not have a disparate impact on older workers.